80-321

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

SYDELL STONE;
ANNE H. BOWERS;
PATRICIA BRICKING, Individually and as Next Friend On Behalf of Her Infant Children, Jennifer Bricking, Elizabeth Bricking and Erica Bricking; and
RABBI MARTIN M. PERLEY - - Petitioners

versus

JAMES B. GRAHAM, Superintendent of Public Instruction - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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August 28, 1980

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QUESTIONS PRESENTED

1. Whether the Kentucky Ten Commandments Statute, KRS 158.178, violates the First Amendment to the Constitution of the United States.

2. Whether the Kentucky Ten Commandments Statute, KRS 158.178, violates the fundamental constitutional rights of the Petitioner, Patricia Ann Bricking, to determine the religious upbringing of her children.

3. Whether the Kentucky Ten Commandments Statute, KRS 158.178, unconstitutionally interferes with the rights of the Petitioner, Anne H. Bowers, a Non-believer in any organized religion.

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No. _____

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RABBI MARTIN M. PERLEY - - - *Petitioners*

v.

JAMES B. GRAHAM, Superintendent of Public Instruction - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioners, Sydell Stone, Anne H. Bowers, Patricia Bricking, individually and as next friend on behalf of her infant children, Jennifer Bricking, Elizabeth Bricking and Erica Bricking; and Rabbi Martin M. Perley, respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the Supreme Court of Kentucky decided April 22, 1980, a rehearing of which was denied on June 3, 1980.

OPINION BELOW

The final judgment and opinion of the Supreme Court of Kentucky is reported as *Stone, et al.* v. *Graham,* Ky., 599 S. W. 2d 157 (1980), and is reprinted in Appendix A, pp. 17-32.

JURISDICTION

The final judgment and opinion of the Supreme Court of Kentucky were entered on April 22, 1980. A timely petition for rehearing was denied on June 3, 1980; this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

United States Constitution, Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Fourteenth Amendment, Section One:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunitities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Kentucky Ten Commandments law requires that a durable copy of the Ten Commandments be posted in every classroom in Kentucky. The Statute, KRS 158.178, reads in full as follows:

> (1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
>
> (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.
>
> (3) The copies required by this section shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this section.

The Petitioners in this case belong to various religious faiths with the exception of Anne H. Bowers, who

is a non-believer in any form of organized religion. On September 14, 1978, the petitioners filed a complaint in Franklin Circuit Court challenging the constitutionality of the Ten Commandments statute. It was specifically alleged in the initial complaint that the provisions of KRS 158.178, violated the First and Fourteenth Amendments to the United States Constitution and Section Five of the Kentucky Constitution.

At the time of the filing of the complaint, the Superintendent of Public Instruction had undertaken certain actions to carry out the statute including: (1) the appointment of a state salaried Education Department employee working during normal business hours as Coordinator of the project; (2) acceptance of voluntary contributions totaling $1,294.88 for deposit with the State Treasurer, and (3) appointment of a committee for the purposes of (a) drafting a version of the Ten Commandments to be used by the schools; (b) determining the method of versification and (c) determining the type of artwork to be used on the plaque.

Upon the filing of the complaint, a restraining order was issued by the Franklin Circuit Court restraining the enforcement of the statute. On October 9, 1978, the trial court entered a temporary injunction enjoining the Superintendent of Public Instruction from enforcing KRS 158.178.

Both parties filed Motions for Summary Judgment and following a hearing, the Honorable Squire N. Williams, Judge, Franklin Circuit Court, Division

II, on March 20, 1979, entered a Summary Judgment for the Respondent. After reviewing relevant Supreme Court decisions the Court specifically held that KRS 158.178 offended neither the United States nor Kentucky Constitution. A timely appeal from this Summary Judgment was filed by Petitioners to the Kentucky Court of Appeals.

On its own motion, under date of October 8, 1979, the Court of Appeals entered an order recommending that the action be transferred to the Supreme Court of Kentucky which Court assumed jurisdiction under order dated October 29, 1979.

The members of the Kentucky Supreme Court participating in this appeal were equally divided and therefore pursuant to the rules of the Court, the judgment of the trial court was affirmed. A petition for rehearing was filed with the Court but was denied on June 3, 1980.

All Federal questions were timely and properly raised both in the original complaint in Franklin Circuit Court and throughout the briefing of the case in the Kentucky Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The Kentucky Supreme Court Has Decided Federal Questions of Substance in a Manner Not in Accordance With Prior Applicable Decisions of This Court.

A. Under Applicable Decisions of this Court the Ten Commandments Law Violates the Establishment Clause.

This Court has developed a three part test for determining whether a challenged state statute violates the Establishment Clause of the First Amendment. The standard was enunciated by this Court in *Lemon* v. *Kurtzman,* 403 U. S. 602, 612, (1971) as follows:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and finally, the statute must not foster an excessive government entanglement with religion."

The Statute must survive scrutiny under each of the three tests.

Epperson v. *Arkansas,* 393 U. S. 97 (1968), involved an Arkansas statute making it a criminal offense for a teacher in any state school to teach the Darwinian theory of evolution. In examining this statute, the Court quoted *Abington School District* v. *Schempp,* 374 U. S. 203 (1963), for the proposition that, if "either the purpose or the primary effect of the enactment is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 393 U. S. at 107.

The Court then held:

> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution. 393 U.S. at 109.

KRS 158.178 cannot be defended on the ground that it is religiously neutral. Its *purpse* is the advancement of religion.

The role of the Bible, and the Ten Commandments in particular, as cornerstones in religious thought cannot be denied. The Kentucky Supreme Court acknowledged that the Ten Commandments is a religious document. Its predominant religious significance is undisputable. The result of posting the Commandments in every classroom in the Commonwealth of Kentucky certainly has the *primary effect* of advancing religion and when combined with the compulsory attendance laws applicable to students there is no available method for a student offended by the posting of the Ten Commandments to avoid confrontation with the religious display.

The statute fosters *excessive government entanglement* with religion. The statute does not say what version of the Ten Commandments is to be used. The Legislature, in effect, delegated that decision to the

Superintendent. No decision has yet been made whether it will be the Authorized Version (The King James Bible), the Revised Standard Version, the Today's English Version, the Douay (The Roman Catholic Translation), the new English Version (the new Authorized Version), the new International Version, the Moffett Translation, the Living Bible Version, or one of the lesser known translations, such as the new translation contained in the Anchor Bible. Neither has it been determined which method of versification will be used in establishing the text to be posted in the classroom. No decision has been made whether to use the versification system that is most widely accepted by Protestants, the system used by Roman Catholics or the system preferred by Jews.

These decisions by State Officials and the involvement of state personnel in the administration of the statute at issue constitute the most extreme form of State entanglement with religion. It not only entangles the State in religion but it embroils it in the midst of religious disputes about the wording of sacred texts. Resolution of that dispute will necessarily advance one religious belief over another.

Specifically, the State becomes entangled because state employees are required to implement the act. The Superintendent of Public Instruction is charged with implementing the act, the State Treasurer must accept and account for the voluntary contributions, various State employees must participate in the bidding process for printing of the Commandments and even the

Attorney for the Superintendent, who is salaried by the State, must defend it. All of this involves the expenditure of State funds and the expenditure of time by salaried State employees, separate and apart from the voluntary contributions. The assertion in the opinion below that "No tax funds are to be expended," ignores completely the realities of the situation. State funds are being expended in fulfilling the mandate of the statute.

The entire issue of government entanglement found clear expression in *Walz* v. *Tax Commission,* 397 U. S. 664 (1970). That decision made it clear that the issue of excessive entanglement also was to be considered. The issue of government entanglement also was thoroughly discussed in *Lemon* v. *Kurtzman (supra).*

The State will have to keep constant surveillance of the classrooms to see that the Commandments are posted and remain posted.

Under any of the above tests this statute fails to meet the First Amendment standards established by this Court, and the Kentucky Supreme Court has failed properly to apply those standards.

Similarly it has been repeatedly recognized by this Court that the doctrine of unconstitutional preference among religious sects also equally applies to preferences between believers and non-believers, *Torcaso* v. *Watkins,* 367 U. S. 488 (1961). KRS 158.178 therefore unconstitutionally interferes with the rights of the Petitioner, Anne H. Bowers, a Non-Believer.

B. Under Applicable Decisions of this Court, the Ten Commandments Law Violates the Constitutionally Protected Right of Parents to Determine the Religious Upbringing of their Children.

KRS 158.178 violates the fundamental constitutional rights of the Petitioner, Patricia Ann Bricking, to determine the religious unbringing of her children. KRS 158.178 is unconstitutional for impermissibly interfering with the fundamental constitutional right of parents to privately raise and inculcate basic religious values in their children. The Ninth Amendment to the United States Constitution as well as the decisions in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), and *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972), were ignored by the Kentucky Supreme Court.

Unless remedied by the Court herein legislatures of other states will undoubtedly follow suit by enacting similar or identical statutes requiring the school rooms of this nation to advance purely religious teachings at the expense of children and their parents.

The decision of the Kentucky Supreme Court upholding the constitutionality the statute seriously jeopardizes the constitutional rights of the petitioners and unless corrected by this Court will lead to the erosion of the principles of separation of church and state which have been so frequently and consistently reasserted by this Court.

Finally, the correctness of the decision below, even assuming the proper test was applied cannot be supported.

II. The Kentucky Supreme Court Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be Decided By This Court.

The Kentucky Supreme Court has decided that a State statute requiring the posting of the Ten Commandments in every public classroom in the Commonwealth of Kentucky is constitutional under the First Amendment to the Constitution of the United States of America.

The First Amendment as made applicable to the states by the Fourteenth Amendment, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In *Everson* v. *Board of Education,* 330 U. S. 1 (1947), this Court stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* 330 U.S. at 15. (Emphasis added.)

In *McCollum* v. *Board of Education,* 333 U. S. 203 (1948), this Court held that a system of released time for religious instruction was unconstitutional. Under this system, religious teachers held classes on public school premises for those students whose parents had signed request cards. This Court specifically noted in *McCollum, supra* at page 212:

> Here not only are the state's tax-supported public school buildings used for the dissemination

> of religious doctrines. The state also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

In *Abington, supra,* this Court held that a state statute which required religious exercises in public schools consisting of the reading, without comment, at the opening of each school day, of verses from the Bible and the recitation of the Lord's Prayer by the students in unison, was unconstitutional as a violation of the First Amendment's Establishment Clause. The Court rejected the defense of the defendant School Board that the morning devotional had secular purposes, such as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetration of our institutions and the teaching of literature."

The Court specifically noted:

> But even if its purpose is not strictly religious, it is sought to be accomplished through readings without comment, from the Bible. *Surely the place of the Bible as an instrument of religion cannot be gainsaid,* and the State's recognition of the prevailing religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting non-attendance at the exercises. None of these factors is consistent with the contention that the Bible is

> here used either as an instrument for non-religious moral inspiration or as a reference for the teaching of secular subjects. 374 U.S. at 224. (Emphasis added.)

The Respondent cannot deny the religious significance of the Ten Commandments nor deny that the posting of the Commandments is an effort to inculcate particular religious beliefs in a captive audience of public school children who are compelled to attend school pursuant to KRS 159.010.

This Court has not, but should decide this issue. The distinction between the posting of the Ten Commandments and the recitation of biblical verse or prayers is inconsequential, however the Kentucky Courts apparently view it as controlling.

III. The Kentucky Supreme Court Has Decided Important Questions of Federal Law in Conflict With a Decision of a Federal District Court.

The only two reported decisions involving the issue of the mandatory posting of the Ten Commandments are this case and *Ring* v. *Grand Fork Public School District Number 1, et al.*, 483 F. Supp. 272 (D.N.D. 1980). These two cases reach different results despite the close similarity of fact. Although *Ring* is a Federal District Court decision, the conflict between that decision and the decision of the Kentucky Supreme Court in an area of Constitutional law that has historically received particular attention by this Court, merits review by this Court.

On January 28, 1980, a federal Disrict Court ruled that the North Dakota Ten Commandments Law, N.D. Cent. Code §15-47-10, violated the First and Fourteenth Amendments to the Constitution of the United States. The District Court in *Ring* analyzed the statute under the applicable decisions of this Court including *Lemon* v. *Kurtzman, supra,* and *Abington School District* v. *Schempp, supra,* thereby concluding that the statute failed to meet two of the three criteria required to withstand an establishment clause challenge. The Court found that the statute did not serve a secular legislative purpose and further that it advanced religion.

The conflict between these two decisions, in this particularly important area of constitutional law, should be resolved by this Court. If the posting of the Ten Commandments in North Dakota impermissibly advances religion, then it does so in Kentucky as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 1980

PROOF OF SERVICE

I, William Cameron Stone, the counsel for the petitioners, hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari were mailed, first class postage prepaid, to Honorable Edward L. Fossett, Office of the Superintendent of Public Instruction, Room 1720, Capital Plaza Tower, Frankfort, Kentucky 40601, Counsel for Respondent, this 28th day of August, 1980.

William Cameron Stone

WILLIAM CAMERON STONE
Attorney for Petitioner

APPENDIX

APPENDIX A

RENDERED: APRIL 22, 1980

SUPREME COURT OF KENTUCKY

79 SC 556 TR

SYDELL STONE, Et Al. - - - - - - *Appellants*

v.

JAMES B. GRAHAM, Superintendent
of Public Instruction - - - - - - *Appellee*

Appeal from Franklin Circuit Court
Honorable Squire N. Williams, Judge
No. 78 CI 1300
CA No. 79 CA 1023 MR

PER CURIAM—AFFIRMING

The members of the court participating in the consideration of this appeal being equally divided, the judgment of the trial court must stand as affirmed without an official opinion of this court. SCR 1.020(1)(a). Justice Stephens declared himself disqualified by reason of his having participated in the controversy in his former capacity as Attorney-General. Justices Lukowsky and Sternberg and Chief Justice Palmore being of the opinion that the statute in question is invalid, would reverse. Their viewpoints are expressed in an opinion by Justice Lukowsky which is attached to this opinion. Justices Aker, Clayton, and Stephenson are of the opinion that the statute is valid, and they would affirm. Separate opinions by Justices

Clayton and Stephenson expressing their respective viewpoints also are attached to this opinion.

The judgment stands affirmed, subject to the provisions of CR 76.32.

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RENDERED: APRIL 22, 1980

SUPREME COURT OF KENTUCKY

79 SC 556 TR

SYDELL STONE, Et Al. - - - - - - *Appellants*

v.

JAMES B. GRAHAM, Superintendent
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Appeal from Franklin Circuit Court
Honorable Squire N. Williams, Judge
No. 78 CI 1300
CA No. 79 CA 1023 MR

OPINION OF JUSTICE LUKOWSKY

The sole issue before this court is whether the Commonwealth or its agents may require the Ten Commandments to be posted on a wall in each public elementary and secondary classroom. I would hold that the Kentucky Bill of Rights does not permit such a mandatory display.

The 1978 General Assembly enacted KRS 159.178[1] which impels this controversy. Simply put, the statute

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[1]KRS 158.178 reads in its entirety:

"(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(Footnote continued on following page)

places the duty upon the Superintendent of Public Instruction to post a copy of the Ten Commandments in every public school classroom. The statute makes this duty conditional upon the receipt of voluntary contributions made for such purpose to the state treasury. The drafters of the statute recognized the potential conflict between the interests of church and state, and attempted to finesse any religious motivation by a declaration to be placed on all copies that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

The passage of this statute was perceived to be a challenge to freedom of conscience, and this litigation soon followed. The plaintiffs below, and appellants here, describe themselves as a Quaker; a Unitarian, a non-believer, a mother of school age children and public school teacher, two children of compulsory school age attending public schools, a Jewish Rabbi, and as taxpayers. They sought temporary and permanent injunctive relief to prohibit the Commonwealth from enforcing KRS 158.178 on the basis that it is unconstitutional. The Franklin Circuit Court restrained and later temporarily enjoined the Commonwealth from implementing KRS 158.178. After hearing the merits, the trial court adjudged KRS 158.178 to be constitutional and dissolved the injunction against the government. This appeal followed. We concurred with

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(Footnote continued from preceding page)

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'

(3) The Copies required by this section shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this section."

the *sua sponte* recommendation of the Court of Appeals for transfer to this court.

This recitation of the facts would be incomplete, however, without a description of a collateral effort to enforce KRS 158.178 *de facto*. The Commonwealth sought an opinion from the Attorney General concerning this statute. The Attorney General summarily stated the statute was constitutional. OAG 78-605. Further, the opinion approved private donations of copies of the Ten Commandments *directly* to the local school boards as being in compliance with the "spirit" of the statute. Following this opinion, an organization called the Kentucky Heritage Foundation actively began to solicit private funds to have copies of the Ten Commandments printed and posted in public school classrooms throughout the state. The Kentucky Heritage Foundation has endeavored to present the issue as a *fait accompli*, announcing in its *amicus curiae* brief that it has raised over $150,000.00, financed 15,000 framed copies which have been placed in all classrooms in 55 counties and in some classrooms in 48 other counties, and that it is working on the remainder.

The combative nature of this case underscores the inherent problems encountered whenever the state delves into religious matters or religion attempts to use the force of the state to further its evangelical aims. Freedom of conscience and of worship is the cornerstone of the foundation of our nation. There is no "official" church in this country; indeed, it is indisputable that many of our forebearers came to America to escape the established church and religious oppression. It is likewise true that once having achieved religious freedom for themselves, certain religious groups became remarkably intolerant of those who hold dissimilar religious views, and they sought to employ the power of the state to further their religious beliefs. It is this enigma that the Kentucky and federal

constitutional protections of religious freedom were designed to address.

The parties have principally argued this case in terms of the first amendment to the federal constitution, applied to the states through the fourteenth amendment. However, unless and until the statute clears the hurdle of the Kentucky constitution the federal question is academic. This is basic to the concept of federalism because the constitutions of the several states may impose higher standards and give stronger protections than those found in the United States constitution. State v. Kaluna, 55 Hawaii 361, 520 P. 2d 51 (1974); State v. Opperman, S. D., 247 N. W. 2d 673 (1976); State v. Miller, Tenn., 584 S. W. 2d 758 (1979). *See* Oregon v. Haas, 420 U. S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975); Cooper v. California, 386 U. S. 58, 62, 87 S. Ct. 788, 791, 17 L. Ed. 2d 730, 734 (1967). Consequently, I must first turn my attention to section 5 of the Kentucky Constitution.[2]

Section 5 of the Kentucky Bill of Rights is unequivocal: "No preference shall ever be given by law . . . to any particular creed . . . ." It is an inescapable conclusion that the Ten Commandments are a religious creed. This

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[2]Section 5 reads in its entirety:

"No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister or religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."

is obvious from the dissension which arose when the Superintendent of Public Instruction invited a committee of various religious leaders, Protestant, Catholic and Jewish, to decide what should be the "official" language of the Ten Commandments to be printed upon the copies to be distributed by the government. The Commonwealth admitted at oral argument that this group was unable to agree upon a mutually acceptable enumeration and wording of the Ten Commandments. We are not advised of the form of the Ten Commandments distributed by the Kentucky Heritage Foundation.

To say that the "differences in the versions of the Ten Commandments are insignificant in serving its secular purpose" as the Commonwealth suggests is preposterous. It is unimportant only if one agrees with the "official" version. For example, the familiar commandment "Thou shall not kill" is also translated as "You must not murder." The difference is significant. The former can be read to prohibit all taking of life, while the latter clearly permits legal killing, e.g., war and capital punishment. For the state to recognize one translation as the "official" one, and require its display to all children who attend public schools, is to give a preference by law to one over the others. Further, there was evidence before the trial court that to some religious groups the Ten Commandments, as a collection, is sacred. Therefore, to label the Decalogue as "secular" in nature detracts from its sanctity.

Webster's Third New International Dictionary defines "creed" in part as "a formulation or epitome of principles, rules, opinions, and precepts formally expressed and seriously adhered to and maintained: . . . ." *See* Augustine v. Anti-Defamation League, 75 Wis. 2d 207, 249 N. Y. 2d 547 (1977) (quoting this definition with approval). Applying language identical to section 5, Indiana decided, "the word 'creed' has a definite meaning, as a formal dec-

laration of religious belief." Hammer v. State, 173 Ind. 199, 89 N. E. 850, 852 (1909). Concisely stated, "a man's creed is what he believes." Hale v. Everett, 53 N. H. 9, 92, 16 Am. Rep. 82 (1868). No one can dispute that Christians, Jews and Muslims subscribe to the Ten Commandments as fundamentals of their religious belief. It is safe to say that Buddhists, Confuscianists, Hindus, Toaists, Shintoists, Sikhs, Jains and Zoroastrainists do not.

The first three commandments (or four, depending upon the translation selected) are undeniably religious injunctions, proclaiming the supremacy of the Lord God, commanding that no other gods or graven images be had, forbidding the use of the name of God in vain, and enjoining that the Sabbath be kept holy. The remaining commandments exhibit a somewhat more secular thrust. However, they cannot be taken separately. It would be ludicrous for one to say that the "Six Commandments" can be used for a non religious purpose. The Ten Commandments are unitary and indivisible, regardless of the version, and are, as a whole, a creed. Consequently, no preference may be given them by law.

It has been only months since we interpreted section 5 in Kentucky State Board for Elementary and Secondary Education v. Rudasill, Ky., 589 S. W. 2d 877 (1979). There we decided that section 5 protected those who chose to send their children to religious schools, because they had conscientious objections to "godless" public schools, from intrusive state regulations of religious schools. We are asked here by religious groups to condone state mandated display of a creed in public school classrooms. It cannot be. Section 5 is a sword that cuts both ways.

The government defines public wrongs as crimes. Morals, on the other hand, are philosophical standards set by a community, by a religious dogma, or by personal ethics. Criminal law standards often differ from moral standards.

> "The criminal law does not attempt to impose or enforce the standards of any particular religion, philosophy, or school of ethics. Apart from the fact that it would be difficult to determine which religions, philosophies, or ethical schools should be selected, the standards thereof would for the most part be too high. In a general way it may be said that the aim of religion, philosophy, or ethical school is, inter alia, the setting of maximum standards for the guidance of human conduct. As a practical matter, the law could not insist that every individual attain such high standards. The law must content itself with establishing and maintaining minimum standards—i.e., standards which are attainable by virtually all individuals—and punishing the failure to conform therewith as a crime." I Wharton's Criminal Law, sec. 5 (Torcia, 14th ed. 1978).

It may well be the duty of the state to educate its citizens as to the minimum standards embodied in the criminal law. But when the government decrees that children shall be exposed to the moral precepts of a creed, it has exceeded constitutionally permissible bounds. The reason for section 5 is obvious: who, on earth, is to declare what is "right" or "moral" for the rest of us? The same power which could place a copy of the Ten Commandments on the wall of every public elementary and secondary classroom could place a copy of the Communist Manifesto upon the same wall. The same state that could require a pledge of allegiance of the "Stars and Stripes" could require a salute to the "Hammer and Sickle." The same power that could demand a rote prayer could demand a rote acknowledgement of atheism. The wall that separates church and state protects as it restricts.

Just as the state may not give preference by law to any particular creed, neither may its subdivisions, the local school districts or classrooms. This does not, as some will undoubtedly suggest, prohibit the use of the Ten Command-

ments or other religious writings when germane to the secular classroom study of history, literature, philosophy, comparative religion, etc.

In this Commonwealth our leaders are selected by the majority will. But section 2 of our constitution provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." The Kentucky Bill of Rights protects the minority from the arbitrary imposition of moral precepts and philosophies by the majority, no matter how right or desirable it may seem to do so. This does not hamstring those who wish to expose others to their conscientious convictions. The power of the freely communicated belief and rational idea is likewise protected by our constitution. Ky. Const. sec. 1 (Fourth). Those who wish to convince others of their convictions cannot take a shortcut by using the state's power to do it for them.

The Kentucky Constitution was written nearly 90 years ago. In recent years it has been criticized as a "horse and buggy" constitution in a "jet" age. In some respects, perhaps so. But the drafters of this constitution labored long to protect the people of this Commonwealth from unbridled power. Section 26 of the Kentucky Bill of Rights states: "To guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void." I would hold that KRS 158.178 gives a preference to a particular creed contrary to section 5 of the Bill of Rights of the Kentucky Constitution and, consequently, is void.[3]

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[3]Recently, former United States Supreme Court Justice Arthur J. Goldberg wrote concerning the role of the Court:

> [T]he first fact about our Constitution [is] that its source is the people. It is they who mandated that the individual be pro-

(Footnote continued on following page)

It seems to me that what I have written here is equally applicable to the claim that KRS 158.178 violates the prohibitions of the First Amendment to the Constitution of the United States. The religious injunctions of the first three commandments (or four, depending upon the translation selected) plainly refute the prescribed statement of secular purpose. It is the Ten Commandments not the "Seven (or Six) Commandments" which are required to be posted. Their presence can have no purpose but to advance a religious creed. When measured by the tape of the federal constitution this statute is unconstitutional and void. It has no real secular purpose; it advances religion and fosters excessive government entanglement with religion. Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); Ring v. Grand Fork Public School Dist. #1, D. N.D., 483 F. Supp. 272 (1980); Comment, Separation of Church and State: Education and Religion in Kentucky, 6 N. Ky. L. Rev. 125, 151 (1979). See, Abington School Dist. v. Schempp, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844

(Footnote continued from preceding page)

> tected and safeguarded in his constitutional rights even against the popular will of the moment as voiced by the legislature or the executive. Our courts were entrusted with the responsibility of judicial review, in large part, to protect individuals and minorities in their fundamental rights against abridgment by both government and majorities.
>
> It is not a denial, therefore, but rather a supreme manifestation of democrary that the fundamental rights of the least among us are protected from government by the Constitution and safeguarded by an independent judiciary. History teaches that democrary and an independent judiciary are inseparable. A country where judges are faithful to the popular will, to the executive or to the legislature, rather than to the rule of law, will not be a democratic country worthy of the name.

Goldberg, Reflections on the Role of the Supreme Court in the Pursuit of Equal Justice, 7 N. Ky. L. Rev. 1, 2 (1980) (footnotes omitted)

(1963); Engel v. Vitale, 370 U. S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962).

As the Supreme Court of the United States put it in Torcaso v. Watkins, 367 U. S. 488, 495, 81 S. Ct. 1680, 1683-1684, 6 L. Ed. 2d 982, 987 (1961):

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (footnotes omitted)

I would reverse the judgment of the Franklin Circuit Court and remand the cause with directions to enter a judgment not inconsistent with this opinion.

I am authorized to state that Palmore, C.J., and Sternberg, J., join in this opinion.

RENDERED: APRIL 22, 1980

SUPREME COURT OF KENTUCKY

79-SC-556-TR

SYDELL STONE, Et Al. - - - - - - *Appellants*

v.

JAMES B. GRAHAM, Superintendent
of Public Instruction - - - - - - *Appellee*

Appeal from Franklin Circuit Court
Honorable Squire N. Williams, Judge
No. 78 CI 1300

OPINION OF JUSTICE CLAYTON

I agree with the trial judge of the Franklin Circuit Court when, in upholding the constitutionality of KRS §158.178, he wrote:

> [T]he fact that the Ten Commandments spring from a religious well does not in itself forever divorce their use for a secular purpose. We can think of no good reason why all or any part of the Bible may not be used for other than religious purposes, for secular purposes, for historical and literary purposes.

Basically, the Ten Commandments is a code of conduct which just happens to be rooted in Judeo-Christian history. For the state to use these particular "rules", if you will, to promote moral and legal behavior among its youth seems perfectly acceptable to me. I fail to see how this law advances religion beyond the fact that it may bring to one's

attention the basic tenets of a particular scheme of Western philosophical thought. Nor do I see how this statute fosters excessive government entanglement with religion, with emphasis on *excessive.*

Justice Clark, speaking for the United States Supreme Court in Abington School District v. Schempp, 374 U. S. 203, 225; 10 L. Ed. 2d 844, 860; 83 S. Ct. 1560, 1573 (1963), stated:

> [I]t might well be said that one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.

This statement has particular relevance to this case since the Commandments are presented objectively and as part of a secular program of education.

The knowledge, understanding and dissemination of philosophical and ethical ideas, and the exposure of students to the various political, moral and religious doctrines that are part of our heritage as human beings are certainly necessary and desirable goals in order to educate the young and help them become mature and informed adults. The Ten Commandments statute is not an invasion of a right; it is a cornerstone of knowledge upon which school boards, teachers, and parents may begin to build the intellectual foundations of Kentucky's youth.

RENDERED: APRIL 22, 1980

SUPREME COURT OF KENTUCKY

79 SC 556 TR

SYDELL STONE, Et Al. - - - - - - *Appellants*

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JAMES B. GRAHAM, Superintendent
of Public Instruction - - - - - - *Appellee*

Appeal from Franklin Circuit Court
Honorable Squire N. Williams, Judge
No. 78 CI 1300
CA No. 79 CA 1023 MR

OPINION OF JUSTICE STEPHENSON

It is my view that the constitutional wall separating church and state is in no danger from the effect of KRS 158.178. Tax money is not involved. Neither the school child nor the faculty member is required to do anything, and the Ten Commandments does have historical as well as religious significance. In my opinion these factors would withstand any First Amendment challenge.

I am perplexed by the major premise of the opinion of Justice Lukowsky. The major premise bases the result of that opinion solely on Section 5 of the Kentucky Constitution, particularly the "no preference" clause. I find no mention of a "particular creed" in the statute. We do not know, for the record does not reveal, the version of the Ten Commandments displayed in the schoolrooms. This is not in the record for the probable reason that none

of the parties viewed Section 5 of the Bill of Rights of the Kentucky Constitution as a problem.

If I understand the posture of that opinion on "creed" as to stand for the proposition that the statute on display of the Ten Commandments offends Section 5 for the reason that Buddhists, Confuscianists, Hindus, Taoists, Shintoists, Sikhs, Jains and Zoroastrainists are creeds whose beliefs do not subscribe to the fundamentals of the Ten Commandments, then I can only say that a statute which required that the Preamble and the Bill of Rights of the Kentucky Constitution to be displayed in the classroom would be equally offensive to those "creeds" since the Preamble reads:

> "We, the people of the Commonwealth of Kentucky, grateful to *Almighty God* for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." (Emphasis added.)

Section I of the Bill of Rights reads:

> "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> * * *
>
> "Second: The right of worshipping *Almighty God* according to the dictates of their consciences." (Emphasis added.)

Unless I am badly mistaken, the reference to "Almighty God" in both does not comport with the beliefs of the Buddhists etc. and in that respect would present the problem of Section I of the Bill of Rights of the Kentucky Constitution being in violation of Section 5.

I just do not believe that Section 5 should be a factor here at all. The statute withstands First Amendment challenge.

APPENDIX B

SUPREME COURT OF KENTUCKY

No. 79-SC-556-TR

SYDELL STONE, Et Al. - - - - - - *Appellants*

v.

JAMES B. GRAHAM, Superintendent
of Public Instruction - - - - - - *Appellee*

Appeal from Franklin Circuit Court
Honorable Squire N. Williams, Judge
No. 78 CI 1300
No. 79 CA 1023 MR

ORDER

The members of this court participating in the consideration of appellant's petition for rehearing being equally divided, the petition for rehearing fails for want of a majority vote of the justices of this court.

Palmore, C. J., and Aker, Clayton, Lukowsky, Stephenson and Sternberg, JJ., sitting.

Entered June 3, 1980.

(s) John D. Palmore
Chief Justice

APPENDIX C

OPINION RENDERED: APRIL 22, 1980

SUPREME COURT OF KENTUCKY

File No. 79-SC-556-TR

SYDELL STONE, Et Al. - - - - - - *Appellants*

v.

JAMES B. GRAHAM, Superintendent
of Public Instruction - - - - - - *Appellee*

Appeal from Franklin Circuit Court
No. 78 CI 1300
No. 79 CA 1023 MR

MANDATE—Issued June 3, 1980

The Court being sufficiently advised, delivered herein a per curiam opinion.

It is therefore considered that the judgment of the Franklin Circuit Court stands affirmed, which is ordered to be certified to said court.

June 3, 1980 Order stating appellants' petition for rehearing fails for want of a majority vote.

A Copy - Attest:
Issued: June 3, 1980

(s) John C. Scott, Clerk

APPENDIX D

FRANKLIN CIRCUIT COURT

No. 78-CI-1300

SYDELL STONE, JUDY MATHENY, ANNE H. BOWERS, PATRICIA ANN BRICKING, and RABBI MARTIN M. PERLEY - - - - - - - - - *Plaintiffs*

v.

JAMES B. GRAHAM, Superintendent of Public Instruction, State of Kentucky - - *Defendant*

OPINION

KRS 158.178 reads in its entirety:

"(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'

(3) The copies required by this section shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this section."

The First Amendment to the Constitution of the United States, as made applicable to the Commonwealth of Kentucky by the Fourteenth Amendment, directs that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof. In addition Section 5 of the Constitution of this Commonwealth mandates that no preference shall be given any religious group or any manner of worship.

Taken literally, KRS 158.178 offends neither the United States nor the Kentucky Constitution. The law does not foster the establishment of a religion, prohibit the exercise of religion, prefer one religious group over another, direct the manner in which worship shall be conducted, or explicitly infringe on any other constitutional safeguard. However, the statute must be subjected to constitutional scrutiny since it provides that the Ten Commandments, a religious document, be displayed on each classroom wall.

In modern times the Supreme Court of the United States, as well as other federal and state courts, has wrestled with the problem of separation of church and state. Jefferson is quoted as stating the constitutional prohibition against establishment of religion was intended as a "wall of separation between church state". Mr. Chief Justice Burger in the recent case of *Lemon* v. *Kurtzman,* 403 U. S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) stated ". . . that the line of separation, far from being a 'wall' is a blurred, indistinct, and variable barrier . . .".

From 1947 to the present our courts have been confronted with many circumstances calculated to evoke constitutional determinations pertaining to religious freedom. For example: tax-raised funds to pay bus fares for parochial students; release from class to attend religious instruction; Sunday closing law; prayer in public schools; Bible reading in school; an anti-evolution statute; erection of a chapel on county property—state property; display of re-

ligious symbols in public schools; display on the wall of every classroom the words "In God We Trust"; erection of a nativity scene on public school lawn; display of a cross on the side of a courthouse; maintenance of a creche in a national park; erection of a cross in a city park. The only instance we find involving the Ten Commandments was administratively disposed of and thereby never reached the courts. See 36 A. L. R. 3d 1256. This case then is one of first impression.

Over the years a multi-pronged test has evolved which, if a law can pass it, assures that at least the constitutional protection afforded by the Establishment Clause has not been abrogated. As set out in *Kurtzman,* the test is:

(1) The statute must have a secular legislative purpose;

(2) Its principal or primary effect must be one that neither advances nor inhibits religion;

(3) The statute must not foster an excessive government entanglement with religion.

And as pointed out by Mr. Justice Brennan in a concurring opinion in *Meek* v. *Pittinger,* 421 U. S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975), a fourth factor was added to the test:

(4) Is there created excessive government entanglement by the divisive political potential of the state program?

There are of course constitutional safeguards other than the Establishment Clause. However, if we read the Supreme Court opinions correctly, any law which can withstand the attack of the four-factor test can stand muster constitutionally. Consequently, it is incumbent upon this court to make findings relative to KRS 158.178 as that statute may be scrutinized under the glare of the test developed by the Supreme Court of the United States.

The General Assembly thought the statute had a secular legislative purpose and specifically said so. The self-serving statement included in the Act is indicative, if nothing else,

of the legislative intent that the purpose of the display is secular.

Moreover, the fact that the Ten Commandments spring from a religious well does not in itself forever divorce their use for a secular purpose. We can think of no good reason why all or any part of the Bible may not be used for other than religious purposes, for secular purposes, for historical and literary purposes.

The Legislature has declared the Ten Commandments to be the fundamental legal code of Western Civilization and the common law of the United States. There was proof submitted here that substantiates that declaration. The common law grew under the influence of men who were free to know and study the Ten Commandments and to adopt the principles of the canon law as it related to various subjects under consideration. As one witness said, "To attempt to understand Western Civilization apart from the impact of biblical law within it and upon it, is to seek a fictitious history and to reject twenty centuries and their progress." It has been observed that history of man is inseparable from the history of religion. *Engle* v. *Vitale,* 370 U. S. 421, 8 L. Ed. 2d 601. Western Civilization was founded thereon.

The statute directs the superintendent of public instruction to ensure that a copy of the Ten Commandments be displayed on the wall of each classroom. Nothing else. No further attention shall be called to the display, and except for a disclaimer which appears at the bottom, the only wording on the plaque shall be the Ten Commandments. The statute does not condone any subjective treatment to accompany the object display.

We do not know the exact language the superintendent of public instruction will use on the plaque. We do know its avowed purpose it to be secular and not religious and thus would neither advance nor inhibit any religion or re-

ligious group, even though the language is not exactly adhered to by any group. The difference in the various translations is, for the purpose of display on a wall, so minimal as to be of no consequence. The principal or primary effect is assuredly one that neither advances nor inhibits religion.

Government involvement in this matter is limited to ensuring that a plaque is placed on each classroom wall, if outside funds are available. No tax funds are to be expended. The government's part begins and ends with hanging the Ten Commandments on the wall. Selection of the wording, and ensuring the display thereof creates so little involvement it could hardly be said to be excessive. In the same vein, if there is any possibility or divisive political potential it has not been shown, nor is it readily discernible.

KRS 158.178 passes all constitutional tests. A judgment in conformity with this Opinion shall be entered.

This, the 20th day of March, 1979.

(s) Squire N. Williams, Jr.
Judge, Franklin Circuit Court
Division Two